IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE S.SIRI JAGAN

THURSDAY, THE 12TH APRIL 2007 / 22ND CHAITHRA 1929

WP(C).No. 31585 of 2006(I)

PETITIONER:

K.VINODINI,
AGED 43 YEARS, D/O.C.K.B.NAIR,
KAIPPANCHERY HOUSE, MANGALAM P.O.,
OTTAPALAM-679 301.

BY ADV. SRI.KAPPILLIL ANILKUMAR
SMT.S.BINDU

RESPONDENTS:

1. UNION OF INDIA, REP. BY THE PRINCIPAL SECRETARY, MINISTRY OF FINANCE, GOVERNMENT OF INDIA, NEW DELHI.

2. PUNJAB NATIONAL BANK, REP. BY ITS AUTHORIZED OFFICER, ASSET RECOVERY AND MANAGEMENT DEPARTMENT, MARKET ROAD, ERNAKULAM.

3. THE RESERVE BANK OF INDIA, REP. BY ITS CHIEF GENERAL MANAGER, DEPARTMENT OF BANKING SUPERVISION, CENTRAL OFFICE, WORLD TRADE CENTRE, CENTRE 1, CUFFEE PARADE, MUMBAI-400 004.

4. UPAC DISTRIBUTORS, A PARTNERSHIP FIRM MR.UNNIKRISHNAN, MANAGING PARTNER, UP BUILDING, MANISSERY, OTTAPALAM.

5. MR.PRAFULLA KUMAR, PARTNER, UPAC DISTRIBUTORS, UP BUILDING, MANISSERY, OTTAPALAM.

BY ADV. SRI.P.K.SURESH KUMAR
SRI.A.SUDHI VASUDEVAN, ADDL.CGSC
SRI.P.JACOB VARGHESE, SC, RBI
SHRI.JOHN VARGHESE, A.S.C.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 12/04/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

W.P(C).No. 31585/06

APPENDIX

PETITIONER'S EXHIBITS:

P1. COPY OF THE WRITTEN STTAEMENT IN O.A.NO.262/03 BEFORE D.R.T

P2. COPY OF THE ORDER OF DRT IN I.A.NO.282/05 DTD.12.6.06.

P3. COPY OF THE ORDER OF THE DRT DTD.12.6.2006 IN I.A.NO.1891/04.

P4. COPY OF THE LETTER DTD.3.2.2005 OF R2.

P5. COPY OF THE REPLY TO EXT.P4.

P6. COPY OF THE POSTAL ACKNOWLEDGMENT.

P7. COPY OF THE NOTICE DTD.8.11.2006.

P8. COPY OF THE OBJECTION DTD.18.11.2006 BEFORE R2 AND R3.

P9. COPY OF THE REPRESENTATION DTD.18.11.2006 BEFORE GOVERNOR, RBI.

Sdk+

///True copy///

P.A. to Judge.

S.SIRI JAGAN, J.

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W.P.(C).No.31585 of 2006

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Dated this the 13th day of April, 2007

J U D G M E N T

The petitioner is a defaulter in repayment of loan amounts due to the 2nd respondent bank. The bank initiated proceedings before the Debts Recovery Tribunal by filing O.A.No.262/2003, which is still pending. While the O.A. was thus pending, the bank initiated the proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("the Act" for short) for bringing the security interest to sale. Admittedly pursuant to the same, possession has been taken by the bank. Now this writ petition is filed challenging the proceedings under the Act on the basis of Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 on the ground that after the amendment to Rule 19 by introducing three provisos to sub section (1) making it obligatory on the bank to obtain leave of the D.R.T. to

withdraw the O.A. before proceedings under the Act, the bank could not have initiated proceedings under the Act without obtaining such permission under Section 19. The learned counsel for the petitioner relies on several decisions in support of the contention of the petitioner, which are specifically referred to in the writ petition itself.

2. In answer to this, the learned counsel for the Bank submits that the doctrine of election is not applicable as between the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act and therefore there is no prior mandatory requirement of withdrawal of the O.A. under the proviso to Section 19(1) of the Debts Recovery Act, to enable the Bank to proceed under the Securitisation Act. He would further submit that whether or not to withdraw the O.A. is in the discretion of the Bank and the proviso to S.19(1) of the Debt Recovery Act is only an enabling

provision in favour of the Bank and not an embargo on the Bank against invoking Securitisation Act. In support of his contentions he relies on the decision of the Supreme Court in *Transcore v. Union of India & Anr*. [I(2007) Banking Cases 33 (SC)].

3. I have considered the rival contentions in detail.

4. All the decisions quoted by the petitioner pales into insignificance in view of the recent decision of the Supreme Court in *Transcore's* case (supra) on the very question as to the applicability of the provisos to Section 19(1) of the Debts Recovery Act to proceedings under the Act. In that decision, after elaborate discussion of all the issues involved relating to provisos to Section 19(1) of the Debts Recovery Act, in paragraphs 44 to 49, the Supreme Court has held as follows:

> "44. In the light of the above discussion, we now examine the doctrine of election. There are three elements of election, namely, existence of two or more remedies; inconsistencies between such remedies and a choice of one of them. If any one of the three elements is not there, the doctrine will not apply. According to American Jurisprudence, 2d. Vol. 25, page 652, if in truth there is only one remedy, then the doctrine of election does not apply. In the present case, as stated above, the NPA Act is an additional

remedy to the DRT Act. Together they constitute one remedy and, therefore, the doctrine of election does not apply. Even according to Snell's Equity (Thirty-first Edition, page 119), the doctrine of election of remedies is applicable only when there are two or more co-existent remedies available to the litigants at the time of election which are repugnant and inconsistent. In any event, there is no repugnancy nor inconsistency between the two remedies, therefore, the doctrine of election has no application.

45. In our view, the judgments of the High Courts which have taken the view that the doctrine of election is applicable are erroneous and liable to be set aside.

46. We have already analysed the scheme of both the Acts. Basically, the NPA Act is enacted to enforce the interest in the financial assets which belongs to the bank/FI by virtue of the contract between the parties or by operation of common law principles or by law. The very object of section 13 of NPA Act is recovery by non-adjudicatory process. A secured asset under NPA Act is an asset in which interest is created by the borrower in favour of the bank/FI and on that basis alone the NPA Act seeks to enforce the security interest by non-adjudicatory process. Essentially, the NPA Act deals with the rights of the secured creditor. The NPA Act proceeds on the basis that the debtor has failed not only to repay the debt, but he has also failed to maintain the level of margin and to maintain value of the security at a level is the other obligation of the debtor. It is this other obligation which invites applicability of NPA Act. It is for this reason, that Sections 13(1) and 13(2) of the NPA Act proceeds on the basis that security interest in the bank/FI needs to be enforced expeditiously without the intervention of the Court/Tribunal; that liability of the borrower has accrued and on account of default in repayment, the account of the borrower in the books of the bank has become non-performing. For the above reasons, NPA Act states that the enforcement could take place by non-adjudicatory process and that the said act removes all fetters under the above circumstances on the rights of the secured creditor.

47. The question still remains as to the object behind insertion of the three provisos to section 19

(1) of the DRT Act *vide* amending Act 30 of 2004. The DRT is a Tribunal, it is the creature of the statute, it has no inherent power which exists in the civil Courts. Order 23 Rule 1(3), CPC states *inter alia* that where the Court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim then the Civil Court may, on such terms as it thinks fit, grant the plaintiff permission to withdraw the entire suit or such part of the claim with liberty to institute a fresh suit in respect thereof. Under Order 23 Rule 1(1)(4)(b), in cases where a suit is withdrawn without the permission of the Court, the plaintiff shall be precluded for instituting any fresh suit in respect of such subject-matter. Order 23 Rule 2 states that any fresh suit instituted on permission granted shall not exclude limitation and the plaintiff should be bound by law of limitation as if the first suit had not been instituted. Order 23 Rule 3 deals with compromise of suits. It states that where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise or where the defendant satisfies the plaintiff in respect of whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith.

48. The object behind introducing the first proviso and the third proviso to section 19(1) of the DRT Act is to align the provisions of DRT Act, the NPA Act and Order 23, CPC. Let us assume for the sake of argument, that an O.A. is filed in the DRT for recovery of an amount on a term loan, on credit facility and on hypothecation account. After filing of O.A., on account of non disposal of the O.A., by the Tribunal due to heavy backlog, the bank finds that one of the three accounts has become sub-standard/loss, in such a case the bank can invoke the NPA Act with or without the permission of the DRT. One cannot lose sight of the fact that even an application for withdrawal/leave takes time for its disposal. As stated above, with inflation in the economy, value of the pledged property/asset depreciate on day-to-day basis. If the borrower does not provide additional asset and the value of the asset pledged keeps on falling then to that extent the account becomes non-performing. Therefore, the bank/FI is required to move

> under NPA Act expeditiously by taking one of the measures by Section 13(4) of the NPA Act. Moreover, Order 23, CPC is an exception to the common law principle of non-suit, hence the proviso to Section 19 (1) became a necessity.
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> 49. For the above reasons, we hold that withdrawal of the O.A. pending before the DRT under the DRT Act is not a pre-condition for taking recourse to NPA Act. It is for the Bank/FI to exercise its discretion as to cases in which it may apply for leave and in cases where they may not apply for leave to withdraw. We do not wish to spell out those circumstances because the said first proviso to Section 19(1) is an enabling provision, which provision may deal with myriad circumstances which we do not wish to spell out herein."

In view of the above decision, it is abundantly clear that whether to apply for leave or not under provisos to Section 19(1) of the Debts Recovery Act, is a discretion of the Financial Institution depending on the circumstances of each case. Apparently in this case the bank has decided to resort to the provisions of the Act without having to obtain leave under Section 19 to withdraw the O.A. That being so, the petitioner's contention on the basis of the provisos Section 19(1) is not worthy of acceptance. Since that is the only contention raised in this writ petition and the only contention which could have been raised for sustaining this writ petition under Article 226 of

the Constitution of India, this writ petition is liable to be dismissed.

5. In so far as other questions are concerned, it is settled law as laid down by the Supreme Court that those are all matters which the borrower has to raise in an appeal to be filed before the DRT under the Act and such question cannot be canvased in proceedings under Article 226 of the Constitution of India (See *Mardia Chemicals' case* – 2004 (2) KLT 273).

In the above circumstances, I do not find any merit in the writ petition and accordingly the same is dismissed.

Sd/-

sdk+ S.SIRI JAGAN, JUDGE

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P.A. to Judge.